

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLIFFORD LANCASTER and DEPARTMENT OF DEFENSE,
DEFENSE SUPPLY CENTER, Columbus, OH

*Docket No. 99-871; Submitted on the Record;
Issued August 10, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant sustained an injury in the performance of duty, as alleged.

On March 26, 1997 appellant, then a 53-year-old meat cutter, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on December 24, 1996, when lifting a box of beef, he sustained an injury to his lower back. Although he did not initially lose any time from work, on April 2, 1997, he filed a claim for compensation on account of traumatic injury or occupational disease (Form CA-7), wherein he alleged that he was unable to work commencing April 1, 1997.

Appellant submitted in support of his claim an accident report indicating that the accident occurred on December 24, 1996, that he felt pain in lower back when he picked up boxes and that he stated that he had a problem with his back before and that he "wanted to make a record in case it bothered him again."

In a medical report dated March 24, 1997, Dr. Rida N. Azer, a Board-certified orthopedic surgeon, opined:

"Tender over L4[-]5 and S1 with pain and muscle spasm on movements. Straight leg raising test is 60 degrees bilaterally. Lasegue's sign is positive bilaterally. Has a right and left S1 hypoesthesia. [Appellant] was also tender over the middle third of the left tibia. No evidence of compartment syndrome. Limitation of motion of the lumbar spine with pain and muscle spasm on movements."

Dr. Azer noted that appellant had been performing his duties. He advised him that there was no harm in working providing he avoids performing any strenuous activities. However, in Dr. Azer's March 31, 1997 medical report, he stated that appellant was totally disabled and was to "remain off work until his next visit." He continued to treat appellant. On April 9, 1997 Dr. Azer gave appellant a lumbar paravertebral nerve block. On the same date, he completed an

attending physician's report where he responded to the question, "Do you believe the condition found was caused or aggravated by the employment activity described? (Please explain answer by checking the 'yes' box)," but he provided no explanation for his conclusion. On April 21, 1997 Dr. Azer opined:

"[Appellant] has significant residuals from his orthopedic conditions and these incur permanent limitations. On a permanent basis [he] should avoid bending, stooping, kneeling, squatting, unprotected heights, pushing, pulling and lifting heavy objects, strenuous activities and strenuous of the upper limbs. These limitations are permanent."

In a medical report dated May 5, 1997, Dr. Azer suggested that appellant retire because of his medical conditions. He stated that, as a result of his injury of December 24, 1996, he had significant residuals which incur permanent limitations.

On May 7, 1997 the Office of Workers' Compensation Programs requested further information from appellant. He responded by letter dated May 13, 1997 and noted that he injured his back while picking up cases of ribs, that he felt a sharp pain in his lower back after lifting a couple of cases, but that he returned to work as he thought the injury was not that severe.

In a medical report dated May 12, 1997, Dr. Azer noted that appellant still had pain in the lumbar spine, but that the muscle relaxant was helping. He noted a limited range of motion, stating that the range on that date was flexion 50 degrees, extension 10 degrees, lateral tilt to the right 5 degrees, to the left 10 degrees with pain and muscle spasm on movements. Dr. Azer reiterated that his condition was as a result of his December 24, 1996 injury.

The employing establishment issued a notice of proposed removal on June 6, 1997, wherein appellant's foreman noted that, due to the back injury that he sustained on December 24, 1996, appellant was unable to perform his duties.

By decision dated June 24, 1997, the Office denied appellant's claim for compensation for the reason that the evidence failed to support the claimed disability from work on and after April 1, 1997 as being related to the employment injury of December 24, 1997.¹

On September 12, 1997 appellant requested reconsideration.

In support thereof, appellant submitted medical reports by Dr. Azer dated June 9 and July 21, 1997 wherein he noted that appellant still had pain in the lumbar spine region. He noted that appellant's condition was caused by his injury of December 24, 1996 and that he has permanent restrictions, but that appellant told him he had to work outside of restrictions.

¹ In the June 24, 1997 decision, the Office makes repeated reference to an intervening injury of February 16, 1996. However, as appellant alleged an injury on December 24, 1996, clearly an incident which occurred on February 16 of the same year would precede the injury and not constitute an intervening injury. Accordingly, the Office's inference that any disability was caused due to a subsequent intervening injury is without merit.

Appellant also submitted reports dated April 27 and May 22, 1998 wherein Dr. Azer noted that he still had pain and muscle spasm on movement and that neurologically he remains status quo.

By decision dated October 22, 1997, the Office noted that it reviewed appellant's case on the merits, but that the request for reconsideration was denied, as the evidence submitted in support of the application was not sufficient to warrant modification of its prior decision.

By letter dated January 27, 1998, appellant requested reconsideration and submitted in support thereof an unsigned medical report from Dr. Azer in which she stated:

"I reviewed [appellant's] medical records and the reports from the Office dated October 22, 1997. It is noted that [he] was injured at work on December 24, 1996 while lifting a box of ribs. This caused [appellant] to have a lumbar disc syndrome with radiculopathy of the left L5-S1 and the right L5 including lumbar disc syndrome from the pressure on the disc on the nerve roots. The clinical findings included today are objective by the muscle spasm, inhibition of ankle jerks, a positive straight leg raising test and hypoesthesia. Further, [his] objective electromyography and nerve conduction study performed March 27, 1997 showed the electrical studies to show, in fact: '(1) A left L5-S1 radiculopathy; (2) A right L5 radiculopathy.' All these findings are objective and are caused by the injury of December 24, 1996."

Dr. Azer followed by listing his restrictions.

By decision dated March 3, 1998, the Office denied appellant's claim for reconsideration on its merits, finding that the evidence was not sufficient to warrant modification of its prior decision.

On August 19, 1998 appellant requested reconsideration of the decision dated March 3, 1998. In support thereof, appellant submitted a medical report by Dr. Azer in which he noted that appellant still had pain in the lumbar spine region and was still tender between L4-5 and S1, and that there was still pain and muscle spasm on movements. He further stated:

"[Appellant's] condition and his diagnosis and his limitations are caused by his work injury of December 24, 1996. The delay before he saw us is common as many patients have back pain and they seek medical advi[c]e only when it does not improve...."

In a decision dated October 29, 1998, the Office, after reviewing the case on the merits, found that the evidence submitted was not sufficient to warrant modification of its previous decision.

The Board finds that this case is not in posture for decision.

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that an injury was sustained in the performance of the duty alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁴

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether "fact of injury" has been established. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place and in the manner alleged.⁵ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁶

In the case at hand, the Office found that appellant had not submitted rationalized medical evidence that appellant's injury to his lower back was caused by his employment injury. In support of his claim, appellant submitted numerous reports by Dr. Azer wherein he opined that appellant's injury was caused by the employment incident. However, he failed to adequately explain his opinion. Nevertheless, while Dr. Azer's reports fail to discharge appellant's burden of proof by proving by the weight of the reliable, substantial and probative evidence that his lower back injury was causally related to the employment incident of December 24, 1996, they constitute sufficient evidence to support appellant's claim and to require further development of the record by the Office, especially when there is no opposing evidence in the record on the issue.⁷

The Office should refer appellant and the case record to an appropriate medical specialist for a second opinion examination and a request to evaluate the existing evidence and provide a rationalized opinion on the issue of whether appellant sustained an injury on December 24, 1996, and, if so, the nature of the injury sustained, and whether appellant sustained any disability as a result of the injury.

² 5 U.S.C. §§ 8101-8193.

³ *Gene A. McCracken*, 46 ECAB 593, 596 (1995); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *Id.*

⁵ *Victor J. Woodhams*, 41 ECAB 345, 353-54 (1989).

⁶ *Id.*

⁷ *John J. Carlone*, 41 ECAB 34 (1989). The Board notes that in this case the record contains no medical opinion to the contrary to appellant's claim and further notes that the Office did not seek advice from an Office medical adviser to refer the case to an Office referral physician for a second opinion.

The decisions of the Office of Workers' Compensation Programs dated October 29 and March 3, 1998 are hereby set aside and the case is remanded to the Office for further proceedings consistent with the decision of the Board, to be followed by a *de novo* decision.

Dated, Washington, D.C.
August 10, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member